IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 12, 2006

STATE OF TENNESSEE v. BRIAN ROBERSON

Appeal from the Circuit Court for Williamson County
No. I-8431 Jeffrey S. Bivins, Judge

No. M2005-01771-CCA-R3-CD - Filed Janaury 11, 2007

The defendant was indicted for sale of cocaine over .5 grams as the result of a purchase by a confidential informant. A jury found the defendant guilty as charged at the conclusion of his trial. The trial court held a sentencing hearing, found that the defendant was an habitual drug offender, as set out in Tennessee Code Annotated section 39-17-417(*l*) and increased his punishment from a Class B felony as a Range III offender to a Class A felony as a Range III offender. The trial court sentenced the defendant to fifty-four years in the state pententiary. The defendant appeals both his conviction and his sentence raising a number of issues. We affirm the defendant's conviction but reverse the defendant's sentence and remand for resentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed in Part; Reversed in Part and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Trudy L. Bloodworth, Nashville, Tennessee, for the appellant, Brian Roberson.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Ron Davis, District Attorney General and Christina L. Ferrell, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Officer Chris Mobley was an officer with the drug task force of the Williamson County Sheriff's Department. On July 15, 2003, he worked with Sylvester Island, a confidential informant, who was making a controlled purchase of cocaine. Island was paid $100 per transaction and had his rent paid by the drug task force. Officer Mobley had worked with Island in the past. Officer Mobley and another officer, Agent Zollicoffer, met Island and searched both his person and his vehicle

finding no contraband. They set up a transmitter and recording device in order to record the purchase. The officers then issued Island $250 to make the purchase. In the presence of the officers, Island made a phone call to the defendant, known to him as "Ratman," in order to schedule the purchase. At some point on Island's way to meet the defendant, the transmitting equipment stopped working. Island met with the officers so that they could fix the problem. Island then continued on his way.

When Island first arrived to meet Ratman, the defendant was not there. Ratman arrived shortly thereafter in his car. The defendant got in Island's car. Island gave the defendant the $250 and the defendant gave Island approximately 5 to 6 grams of crack cocaine. After the deal was over, Island began talking to a neighbor while the defendant departed in his car. Island returned to the officers at the meeting location.

The officers once again searched Island and his vehicle and found no contraband other than that just purchased. Island gave the Officer Zollicoffer the cocaine he had purchased with the $250. The cocaine's preliminary weight was 6.2 grams. Upon returning to the drug task force, the officers conducted a field test, and the substance tested positive for being cocaine. The officers placed the cocaine in an evidence bag, sealed the bag with tape, and wrote their initials on the tape. The evidence bag was placed in a temporary evidence locker.

Joey Kimble is the Director of the 21st Judicial District Drug Task Force. He is also the evidence custodian. On July 16, 2003, he retrieved the cocaine sold by the defendant to Island and placed it in the evidence room.

On August 11, 2003, the Grand Jury of Williamson County indicted the defendant for two counts of selling .5 grams or more of cocaine.

On October 1, 2003, Director Kimble took the cocaine to the TBI laboratory and gave the cocaine to a lab technician. Agent Cassandra Franklin is a forensic chemist with the Tennessee Bureau of Investigation. She received a sealed bag from a laboratory technician. She opened the bag and tested the substance. She tested the substance purchased by Island at the TBI laboratory. She determined that the substance was indeed cocaine, and the cocaine base weighed 5.4 grams. After testing the cocaine, she replaced the cocaine in the bag and sealed the bag with evidence tape and wrote her initials on the tape.

On January 21, 2004, Director Kimble retrieved the cocaine and returned it to the evidence room at the drug task force where it remained until the day of trial.

At the conclusion of a jury trial held on March 8, 2005, the jury found the defendant guilty of one count of the sale of .5 grams or more of cocaine. The trial court held a sentencing hearing on May 16, 2005. The trial court sentenced the defendant to fifty-four years as a Range III Persistent Offender to be served consecutively to two unrelated sentences. The defendant filed a timely notice of appeal.

ANALYSIS

The defendant argues six issues on appeal: (1) whether the trial court erred by failing to have the defendant enter a plea of "not guilty" in front of the jury; (2) whether the chain of custody was broken and the trial court erred in allowing the cocaine and lab report into evidence; (3) whether the evidence was insufficient to support his conviction for sale of .5 grams or more of cocaine; (4) whether the trial court erred in denying the defendant's request that the indictment be dismissed; (5) whether the trial court erred in sentencing; and (6) whether the trial court erred in not allowing trial counsel the opportunity to impeach the informant with prior bad acts.

"Not Guilty" Plea in Front of Jury

The defendant first argues that he is entitled to a new trial because the trial court did not have the defendant enter a plea of "not guilty" in front of the jury. The defendant cites Sams v. State, 180 S.W. 173 (Tenn. 1915) and Link v. State, 50 Tenn. (3 Heisk.) 252 (Tenn. 1871). The State argues that entering a plea in front of a jury is not required.

We have found no support for the defendant's proposition that a defendant must enter his plea of not guilty in front of the jury. The two cases cited by the defendant merely state that a defendant must enter a plea of not guilty at some time before trial, but neither case states that a defendant must enter the plea in front of a jury. Furthermore, our own research has found no authority that requires a plea of not guilty to be entered in front of a jury. If the record demonstrates that a jury was sworn in a felony case, then the absence of a formal plea from the record does not entitle the defendant to a new trial. Stewart v. State, 46 S.W.2d 811, 812-13 (Tenn. 1931).

Therefore, this issue is without merit.

Chain of Custody of Cocaine

The defendant argues that the State did not establish the chain of custody for the cocaine purchased from the defendant that was sent to the TBI labs for testing. The defendant specifically argues that there is a missing link at the point where the Drug Task Force Director left the cocaine with a worker at the receiving area of the TBI lab but could not remember the name of the worker. He contends that this lapse prohibits the State from establishing the proper chain of custody.

Before tangible evidence may be introduced, the party offering the evidence must either call a witness who is able to identify the evidence or must establish an unbroken chain of custody. State v. Holloman, 835 S.W.2d 42, 46 (Tenn. Crim. App. 1992). However, "the identity of tangible evidence need not be proven beyond all possibility of doubt, and all possibility of tampering need not be excluded." Id. Also, the failure to call all of the witnesses who handled the evidence does not necessarily preclude its admission into evidence. See State v. Johnson, 673 S.W.2d 877, 881 (Tenn. Crim. App. 1984). Rather, "it is sufficient if the facts establish a reasonable assurance of the identity of the evidence." State v. Woods, 806 S.W.2d 205, 212 (Tenn. Crim. App. 1990).

"Whether the required chain of custody has been sufficiently established to justify the admission of evidence is a matter committed to the sound discretion of the trial court, and the court's determination will not be overturned in the absence of a clearly mistaken exercise of that discretion." Holloman, 835 S.W.2d at 46.

The State presented the following evidence with regard to the chain of custody. Officers Zollicoffer and Mobley searched both Island and his car before they sent Island to purchase the cocaine. After completing the buy, Island returned to the officers and gave Officer Mobley the cocaine. The officers also searched both Island and his car upon his return. Officer Mobley then took the cocaine back to the drug task force office and placed it in a sealed evidence bag with both his initials and Officer Zollicoffer's initials on the evidence tape. This bag was placed in a temporary locker on July 15. The director of the drug task force, Joey Kimble, is the only person who had access to the locker once something was secured inside. On July 16, Director Kimble placed the cocaine in the evidence room. On October 1, 2003, the director took the cocaine to the TBI lab in Nashville. Director Kimble gave the cocaine in its sealed bag to a TBI employee at the receiving area of the TBI laboratory. The sealed bag was given a lab number for the case and put into storage until Cassandra Franklin, a forensic chemist, with the TBI received it. The bag was sealed when she received it. A submittal form accompanied evidence showing which technician received the evidence from the police department and which lab technician gave the evidence to Agent Franklin. Agent Franklin tested the cocaine and placed it back in the bag. Agent Franklin sealed the bag and placed her initials on the evidence tape. On January 21, 2004, Director Kimble retrieved the sealed bag from the TBI lab. He placed the bag in the evidence room at the police station where it remained in a sealed condition until he checked it out for the defendant's trial. The bag was still sealed when it was presented at trial.

The defendant argues that the cocaine cannot be placed into evidence because the State did not produce the TBI employee who received the evidence from Director Kimble. As noted above, it is not necessary to present every person who handled a piece of evidence. The State presented sufficient facts to "establish a reasonable assurance of the identity of the evidence." Woods, 806 S.W.2d at 212. For this reason, we hold that the trial court did not abuse its discretion in allowing the cocaine into evidence.

This issue is without merit.

Sufficiency of the Evidence

The defendant argues that the evidence was insufficient to support his conviction. He specifically argues that Officer Mobley could not physically see the transaction and the only proof he had of the transaction is the tape recordings. The videotapes did not show money or the defendant in possession of any drugs. The defendant also points to a portion of the videotape where the confidential informant stepped out of view of the camera to speak to a third person. The defendant further argues that Officer Mobley did not conduct a full body search of the confidential informant, including his underwear.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" state's witnesses and resolves all conflicts in the testimony in favor of the state. State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. Id. The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. See Tenn. R. App. P. 13(e); Harris, 839 S.W.2d at 75. In making this decision, we are to accord the state "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." See Tuggle, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. State v. Morgan, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." Matthews, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

Tennessee Code Annotated section 39-17-417 states:

> (a) It is an offense for a defendant to knowingly:
> . . . .
> (3) Sell a controlled substance; . . .
> (c) A violation of subsection (a) with respect to:
> (1) Cocaine is a Class B felony if the amount involved is point five (.5) grams or more of any substance containing cocaine and, in addition thereto, may be fined not more than one hundred thousand dollars ($100,000) . . . .

When the evidence is viewed in a light more favorable to the State, it shows that the confidential informant contacted the defendant by telephone and set up a meeting to buy the cocaine. When the confidential informant was last in arriving at the meeting place, the defendant called him to find out where he was. The confidential informant arrived and he gave the defendant $250. In return the defendant gave the confidential informant over .5 grams of crack cocaine.

The defendant argues on appeal that the evidence is insufficient because the videotape of the sale does not specifically show the exchange of money for cocaine. The defendant also argues that the exchange on the video and audio tapes did not include words that "constitute and offer, acceptance or a sale of drugs." The defendant also alleges that the search of the confidential

informant completed by the officers did not include a full body search or a search of the confidential informant's underwear. The defendant argues that such an incomplete search would enable the confidential informant to hide cocaine on his person.

These arguments require us to second-guess the determination of the jury. The jury is the sole trier of fact and determines all issues with regard to credibility of witnesses as well as any inferences to be drawn from circumstantial evidence. There was evidence presented in addition to the audio and video tapes of the sale that were played for the jury during Officer Mobley's testimony. The evidence included the first-hand testimony of the confidential informant describing the buy. It is apparent that the jury found the confidential informant both credible and reliable and that Island had not concealed other cocaine on his person. For this reason, we find that there was sufficient evidence to support the defendant's conviction.

This issue is without merit.

Exculpatory Evidence

The defendant next argues that the trial court erred because it denied the defendant's request to dismiss the defendant's indictment based upon the State's failure to reveal the true nature of the confidential informant's compensation. The State disclosed to the defendant that the confidential informant was paid $100 per buy. The confidential informant confirmed this fact at trial. However, at trial, it also came to light, during Officer Mobley's testimony, that the 21st Judicial Drug Task Force would occasionally pay the confidential informant's rent and utilities. The defendant asked for a dismissal of indictment which the trial court denied. The defendant argues on appeal that the trial court erred in denying his request. The State argues that the defendant has waived this issue.

As part of this section of his brief, the defendant cites two cases that address an exculpatory evidence issue, Workman v. State, 868 S.W.2d 705 (Tenn. Crim. App. 1993) and Giglio v. United States, 405 U.S. 150 (1972). However, the defendant does not include any analysis of the situation at hand with regard to the law of the State's failure to supply the defense with exculpatory evidence.

In Brady v. Maryland, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). In order to establish a due process violation under Brady, four prerequisites must be met:

1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information, whether requested or not);
2. The State must have suppressed the information;
3. The information must have been favorable to the accused; and

4. The information must have been material.

State v. Edgin, 902 S.W.2d 387, 389 (Tenn.1995). Brady does not require the prosecution "to disclose information that the accused already possesses or is able to obtain." State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992). The burden of proving a Brady violation rests with the defendant, and the violation must be proven by a preponderance of the evidence. Edgin, 902 S.W.2d at 389.

This Court has stated that in order to establish a Brady violation, the information need not be admissible, only favorable to the defendant. See State v. Spurlock, 874 S.W.2d 602, 609 (Tenn. Crim. App.1993). Favorable evidence includes evidence that "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." Johnson v. State, 38 S.W.3d 52, 56-57 (Tenn.2001) (quoting Commonwealth v. Ellison, 379 N.E.2d 560, 571 (1978)). This Court will deem evidence material if a reasonable probability exists that the result of the proceeding would have been different had the evidence been disclosed. See United States v. Bagley, 473 U.S. 667, 682 (1985). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. at 682 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

Unlike most cases wherein the existence and withholding of exculpatory evidence is not revealed until after a conviction, the allegedly exculpatory evidence in this case was made known to the jury and the defendant was able to fully cross-examine the state's witnesses with regard to it. Obviously, knowledge of the compensation arrangement with Island did not impact the jury's assessment of his credibility. Therefore, we conclude that there is no reasonable probability that the jury's verdict would have been different had the defendant obtained this information prior to trial.

Therefore, this issue is without merit.

Prior Bad Acts

The defendant also argues that the trial court erred in denying his counsel the opportunity to question the confidential informant about his prior drug charges. In this portion of his brief, the defendant does not cite to the record to show this Court when this occurred at trial. In addition, the defendant states, "It is not clear from the record whether the convictions involved misdemeanor or felony convictions. If the convictions were over a one (1) year period, the court should have allowed trial counsel to ask the witness about the convictions." The State argues that the defendant has waived this issue because the defendant did not make citations to the record and has not prepared an adequate record for review.

Prior to the confidential informant's testimony, the defendant's trial counsel requested permission to question the confidential informant about a previous conviction for possession of a

forged instrument and some drug charges. Trial counsel stated that he wanted to discover whether the confidential informant began his work in order to work off prior drug charges. The trial court held a jury-out hearing prior to the confidential informant's testimony which included the examination of the informant regarding the conviction and charges in question. As part of that questioning, the defendant stated that a charge of "a dangerous drug sale," which occurred in 1988, had been dismissed. The confidential informant also stated that the charges were not dismissed as a result of him doing some work for law enforcement. Following the jury-out hearing the trial court allowed trial counsel to question the informant regarding a forged check, but not about the dismissed drug charges.

Under Rule 609 of the Tennessee Rules of Evidence, a witness's credibility may be impeached by prior convictions if certain criteria are met. Among the criteria is that the crime must be punishable by death or at least a one year imprisonment or involve dishonesty or false statement. Tenn. R. Evid. 609(a)(2). In addition, the conviction must not have occurred more than ten years before the current proceedings, and if it is more than ten years, there must be sufficient notice from the defense for it to be used. Tenn. R. Evid. 609(b). A trial court's decision under this rule will not be overturned absent an abuse of discretion. State v. Mixon, 983 S.W.2d 661, 675 (Tenn. 1999).

There is no evidence that the trial court abused its discretion in its ruling. Initially, the confidential informant testified in the jury-out hearing that the charges were dismissed. Therefore, it is logical to assume that there was no conviction, as required by the rule. In addition, the charges, which occurred in 1988, were clearly more than ten years old. There is a statement in the record by the State that there was no notice given that the defendant intended to use these charges to impeach the informant. Also, we are unable to determine, under the record that is before us, whether the drug charge was a felony or a misdemeanor. The defendant himself states in his brief that he is unable to make this determination. Under these circumstances the trial court did not abuse its discretion in disallowing cross-examination on this point.

This issue is without merit.

Sentencing

The defendant argues that the trial court erred in sentencing him to fifty-four years as a persistent offender for his conviction of sale of cocaine over .5 grams, which is a Class B felony. The defendant states that this sentence is not a proper application of the habitual drug offender provisions of Tennessee Code Annotated. The State concedes that the trial court improperly applied the habitual drug offender provisions.

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the

sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. Tenn. Code Ann. §§ 40-35-103(5), -210(b); Ashby, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." Ashby, 823 S.W.2d at 169.

In balancing these concerns, a trial court should start at the presumptive sentence, enhance the sentence within the range for existing enhancement factors, and then reduce the sentence within the range for existing mitigating factors. Tenn. Code Ann. § 40-35-210(e). No particular weight for each factor is prescribed by the statute. See State v. Santiago, 914 S.W.2d 116, 125 (Tenn. Crim. App. 1995). The weight given to each factor is left to the discretion of the trial court as long as it comports with the sentencing principles and purposes of our code and as long as its findings are supported by the record. Id.[1]

The defendant's conviction for sale of cocaine over .5 grams is a Class B felony. The defendant had five prior convictions which placed him in the Range III persistent offender category. See Tenn. Code Ann. § 40-35-107(a). As a Range III persistent offender, the defendant was subject to a sentencing range of twenty to thirty years to be served at forty-five percent before parole eligibility. See Tenn. Code Ann. § 40-35-112(c)(2). The State filed notice that it was seeking enhanced punishment within the time limit set out in Tennessee Code Annotated section 40-35-202. In addition to seeking sentencing as a Range III persistent offender, the State also sought sentencing of the defendant as a habitual drug offender under Tennessee Code Annotated section 39-17-417(*l*). When a defendant is found to meet the requirements of being an habitual drug offender, he "shall be sentenced to one range of punishment higher than the range of punishment otherwise provided for in § 40-35-105. . . ." Tenn. Code Ann. § 39-17-417(*l*)(3).

At the conclusion of the sentencing hearing, the trial court sentenced the defendant to fifty-four years as a Range III Persistent offender. The trial court stated:

[1]We note that the Tennessee Supreme Court has determined that despite the ability of trial judges to set sentences above the presumptive sentence based on the finding of enhancement factors neither found by a jury or admitted by a defendant, Tennessee's sentencing structure does not violate the Sixth Amendment and does not conflict with the holdings of Blakely v. Washington, 542 U.S. 296 (2004), United States v. Booker, 543 U.S. 220 (2005), or United States v. FanFan, the case consolidated with Booker, because "the Reform Act [of Tennessee] authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors . . . all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature." State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005). Effective July 1, 2005, the Tennessee General Assembly amended the sentencing act to reflect the advisory nature of enhancement factors.

> Based upon that, the Court so finds and designates [the defendant], for purposes of this sentencing hearing, as a habitual drug offender pursuant to T.C.A. 39-17-417.
>
> As this is a B felony and a conviction for which sentencing we're here on today, pursuant to that statute, since he has been declared a habitual drug offender, that it was enhanced to an A felony.
>
> . . . [T]herefore with the sentencing under an A felony persistent offender, which would be a range of 40 to 60 years, which this court would be looking at.

As stated above, the statute requires the defendant to be sentenced to one range higher, not one class of felony higher. Therefore, the defendant should have been sentenced to a Class B felony as a Range IV career offender instead of a Class A felony as a Range III persistent offender. The proper range for a Class B felony as a Range IV career offender is "the maximum sentence within the applicable Range III." Tenn. Code Ann. § 40-35-108. The maximum in the range for a Class B felony is thirty years.

Clearly, the trial court erred in sentencing the defendant. Therefore, we must remand for resentencing of the defendant in accordance with this opinion.

CONCLUSION

For the foregoing reasons, we affirm in part and reverse and remand in part the judgment of the trial court.

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JERRY L. SMITH, JUDGE